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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Reallocation of Digital Electronic Messaging Service	)	ET Docket No. 97-99
	)	

To: The Commission

PETITION FOR RECONSIDERATION

BELLSOUTH CORPORATION

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TABLE OF CONTENTS

SUMMARY

The Commission should reconsider its decision in the *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service* by vacating it immediately and issuing a notice of proposed rulemaking. First, the *Order*, which was promulgated without public notice and opportunity for public comment, violates the requirements of the Administrative Procedure Act. Second, the *Order* does not fit within either the narrowly-tailored "military affairs" or the "just cause" exceptions that the Commission relies upon to abandon the Act's public involvement requirement. In particular, there is no direct nexus between the 24 GHz rules adopted and any military affairs. Moreover, the lengthy transition period that the Commission adopted makes clear that there was no immediacy warranting departure from notice and comment rulemaking. In fact, the Commission's decision appears to have been reached in order to aid private parties — Teledesic and Associated — by ending a dispute regarding their shared access to the 18 GHz band.

Moreover, to extent that the Commission proposes to reallocate incumbent DEMS licensees from the 18 GHz band to the 24 GHz band, the incumbent DEMS licensees should occupy no more than the amount of spectrum that those licensees occupied in the 18 GHz band. A grant of a substantial amount of additional spectrum would be a windfall to those incumbent DEMS licensees. This windfall will result in unjust enrichment of the DEMS licensees, and untold financial loss to the U.S. Treasury.

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To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby petitions the Commission for reconsideration of its decision in *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service*, ET Docket No. 93-62, *Order*, FCC 97-95 (Mar 14, 1997), *summarized* 62 Fed. Reg. 24,576 (May 6, 1997) (*"24 GHz Order" or "Order"*). Because the *Order* was promulgated without notice and comment, the Commission should vacate it immediately and issue a notice of proposed rulemaking.

While it may be appropriate for the Commission and the National Telecommunications and Information Administration ("NTIA") to maintain the digital electronic messaging service ("DEMS") on a nationwide unified frequency band, nevertheless, the Commission must adhere scrupulously to the requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Specifically, as required by the APA, the Commission must give the public the opportunity to comment on the amount of spectrum that should be allocated to DEMS licensees that will be relocated from the 17.8-20.2 GHz band ("18 GHz band") to the 24.25-24.45 GHz and 25.05-25.25 GHz bands ("24 GHz band"), the use to which the 24 GHz band should be put, and the process by

which any additional 24 GHz spectrum should be apportioned to other interested parties. To the extent that the Commission proposes to reallocate incumbent DEMS licensees from the 18 GHz band to the 24 GHz band, incumbent DEMS licensees should occupy no more than the amount of spectrum that those licensees occupied in the 18 GHz band.. The allocation of additional spectrum should be determined as a result of the rulemaking required by the APA.

BACKGROUND

On September 9, 1983, the Commission allocated the 18 GHz band for use by digital electronic messaging services ("DEMS") in linking computer and document-processing equipment through wireless networks.[1] Subsequently, Associated Group, Inc. ("AGI"), the parent company of Associated Communications, L.L.P. ("Associated"), began submitting applications to the Commission for DEMS licenses in the 18 GHz band — then believed to be a "defunct service" due to the technological difficulties involved in making that spectrum commercially viable — and ultimately obtained licenses in 31 major markets.[2]

In 1994, once the 18 GHz spectrum was more commercially attractive due to technological advances, Teledesic Corporation ("Teledesic"), jointly owned by Craig McCaw and Bill Gates, unveiled its plans for an 18 GHz band global voice and data communications system consisting of "a necklace of 840 satellites."[3] The 18 GHz band was to be considered for a variety of international

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1 *Amendment of the Commission's Rules to Allocate Spectrum in Point-to-Point Microwave Radio Systems for the Provision of Digital Electronic Message Services,* GEN Docket 79-188, *Second Report and Order,* FCC 83-392 (Sep. 9, 1983), *summarized,* 48 Fed. Reg. 50,322 (Nov. 1, 1983) *(Second Report and Order).*

2 Mike Mills, *A $20 Million Man on a Billion-Dollar Mission,* The Washington Post, Sep. 15, 1996, at H1 (noting that the President and Chief Operating Officer of AT&T, Alex Mandl, had left AT&T to become Chairman and CEO of Associated).

3 Jeannine Aversa, *FCC Reviews Agreement Between McCaw and Associated to End Airwaves Feud,* Associated Press, March 12, 1997, Business News.

satellite uses at the upcoming 1995 World Radiocommunications Conference ("WRC"), and Teledesic began efforts to obtain international clearances for its proposed use.

On July 31, 1995, the Commission issued a *Memorandum Opinion and Order* permitting U.S. government use of the 18 GHz band for military space-to-Earth ("downlink") fixed-satellite transmissions, in addition to the non-government services already authorized in the 18 GHz band.[4] This *MO&O* was in response to an NTIA request for a reallocation needed for the satisfactory functioning of government space systems, because the bands that were allocated for government use could not accommodate the Department of Defense requirements.[5] The Commission found that reallocation of the 18 GHz band was necessary for the "exercise of military functions," and that "based on urgent national security needs, notice and public comment [were] for good cause shown, impracticable, unnecessary, and contrary to the public interest."[6] In particular, the Commission relied on NTIA's representation that urgent action was needed because the 18 GHz band was scheduled to be considered at the WRC.

At the WRC, Teledesic was successful in obtaining a partial international clearance of the 18 GHz band for its planned satellite network. Then, on July 17, 1996, the Commission implemented Teledesic's WRC clearance by adopting an Order that allocated the 18 GHz spectrum

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4 *Amendment of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite service in the 17.8-20.2 GHz Band for Government Use, Memorandum Opinion and Order,* 10 F.C.C.R. 9931 (1995) (*MO&O*).

5 *Id.* at 9931.

6 *Id.* at 9932.

to fixed-satellite downlink services.[7] The Commission's dual allocation of the 18 GHz band for DEMS and fixed-satellite transmissions sparked a dispute between Teledesic and Associated.

The following year, the FCC concluded that DEMS systems posed the greatest interference threat to U.S. military satellite transmissions of all the services authorized in the 18 GHz band. As a result, the Commission issued a freeze on the filing of DEMS applications in the 18 GHz band in August 1996.[8] It did not propose any rule changes at that time, nor did it seek public comment.

On March 14, 1997, the Commission issued the *Order* under review, adopting new DEMS rules and reallocating spectrum from the 24 GHz band for DEMS without providing any opportunity for notice or comment. Specifically, the Commission amended its rules to permit fixed service use of the 24 GHz band, reassigned DEMS from the 18 GHz band to the 24 GHz band, and quadrupled the available spectrum for incumbent DEMS licensees.[9] The Commission concluded that, "based on national security needs and because notice and public comment procedures are otherwise, for good cause shown, unnecessary and contrary to the public interest, notice and comment procedures need not be followed prior to adoption of these rules."[10]

Also on March 14, 1997, the Commission released an *Order and Authorization* that permitted Teledesic to construct, launch, and operate a satellite system to provide domestic and

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[7] *Rulemaking to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services,* CC Docket 92-297, *Report and Order,* 11 F.C.C.R. 19,005 (1996) (*LMDS R&O*).

[8] *Freeze on the Filing of Applications for New Licensees, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band,* DA 96-1481 (rel. Aug. 80, 1996 Chief, WTB), *summarized* 62 Fed. Reg 24576, 24577 (*"Freeze Order"*).

[9] *24 GHz Order* at ¶ 12.

[10] *24 GHz Order* at ¶ 18.

international fixed-satellite services ("FSS") in, *inter alia*, the space-to-earth (downlink) frequencies at the 18 GHz band.[11]

As shown below, there are no military operations in the 24 GHz band where DEMS systems are to be relocated, and therefore there is no direct military or national security rationale which serves to prevent public participation in the promulgation of rules that the Commission adopts to govern the 24 GHz band. Moreover, the Commission's "good cause" basis does not justify an exception. Thus, the Commission's reallocation of DEMS to the 24 GHz band without notice and comment contravenes Section 553 of the APA, as discussed in greater detail below.[12]

DISCUSSION

I. THE REALLOCATION OF DEMS TO THE 24 GHZ BAND WITHOUT NOTICE AND COMMENT VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

Section 553 of the APA generally "guarantee[s] to the public an opportunity to participate in the rule making process."[13] This public participation assures that a federal agency will be more likely to be responsive to the needs and concerns of those who will be affected by a rulemaking, by bringing together the facts, information, and alternative solutions to a particular problem.[14] There are, however, very limited statutory exceptions to this notice and comment requirement, where the policies promoted by public participation in rulemaking are outweighed by other concerns. In

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[11] *Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service*, DA 97-527, *Order and Authorization*, 12 F.C.C.R. 3154 (1997).

[12] 5 U.S.C. § 553.

[13] U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 26 (1947).

[14] *Guardian Federal Savings and Loan Ass'n. v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658 (662) (D.C. Cir. 1978).

adopting the DEMS reallocation rules, the Commission relies on two such exceptions — the "military affairs" and "just cause" exceptions contained in Sections 553(a)(1) and 553(b)(B) of the APA.[15] Specifically, those exceptions apply when a rulemaking involves "a military or foreign affairs function of the United States,"[16] or "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[17] Courts have found, however, that both of those exceptions to the notice and comment requirements of the APA must be "narrowly construed and only reluctantly countenanced."[18] Neither exception was available here, as we show below. Accordingly, the Commission's *Order* was issued without legal authority and should be vacated so that a rulemaking can proceed.[19]

A. The DEMS Reallocation Does Not Fall Within the APA's Section 553(a)(1) Military Affairs Exception From Notice and Comment Procedures

All legislative rules issued pursuant to a delegation of congressional authority and having the force of law are subject to the requirements of the APA, unless otherwise exempt. The exceptions to the APA rulemaking requirement are not "to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public."[20] Indeed, the legislative history of the APA's military affairs exception shows that the

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15 5 U.S.C. §§ 553(a)(1), 553(b)(B).

16 5 U.S.C. § 553(a)(1).

17 5 U.S.C. § 553(b)(B).

18 *Independent Guard Ass'n. v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) (*quoting Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)), *modified* 69 F.3d 1038 (1996); *accord* 2 Am. Jur. 2d § 190.

19 *National Tour Brokers Association v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

20 S. Rep. No. 79-752 at 13 (1945); *accord* H. R. Rep. No. 79-1980 at 23 (1946).

military exception from notice and comment of rule making proceedings was intended to have a narrow scope and would apply only "'to the extent' that the excepted subject matter is *clearly and directly involved.*"[21] The Commission, in revising its *ex parte* rules governing formal rulemaking proceedings, has itself recognized this limitation on the military affairs exception.

> Our basis for including a military and foreign affairs exemption in the rules was largely to codify exceptions that appear in the APA. Section[] 553(a)(1) of the APA make[s] rule making and adjudication procedures inapplicable "to the extent that there is involved," *inter alia*, military or foreign affairs functions. *The legislative history clarifies that the rule making exemptions "apply only 'to the extent' that the excepted subject matter is clearly and directly involved."*[22]

Military affairs are not "clearly and directly involved" with the operations on the 24 GHz band. Under this standard, the military use of the 18 GHz band would *at most* permit the Commission to place restrictions on nongovernment usage of the 18 GHz band without notice and comment. That is just what the Commission had *previously* done, when it placed a freeze on new 18 GHz applications and required licensees to apply for authority to commence operations in areas with the greatest potential for conflict with military spectrum use. However, the 24 GHz band does not clearly and directly involve military affairs, and the rules adopted in the *Order* apply only in the 24 GHz band.

The Ninth Circuit has held that the military affairs exception to the APA can be invoked "only where the activities being regulated *directly* involve a military function."[23] The nexus that is

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21 *Id.*

22 *Amendment of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, GEN Docket No. 86-225, *Report and Order*, 2 F.C.C.R. 3011, 3017-18 (1987).

23 *O'Leary*, 57 F.3d 766, 770 (9th Cir. 1995) (emphasis added). The Court made clear that when there is no evidence that the military has ever exercised any direct supervisorial control over civilian activities, the military exception does not apply.

required to invoke the military affairs exception is articulated in *Independent Guard Association of Nevada v. O'Leary*, which explicitly turns on the proper scope of the military affairs exception.[24] There, the court looked to "the function that was being regulated" to determine whether the military affairs exception was triggered. The issue in *O'Leary* was whether civilian guards, who were the subject of the challenged regulation which was adopted without a notice and comment proceeding, fell within the military function exception. The Secretary of the Department of Energy ("Secretary") attempted to argue that the military function exception logically encompassed the civilian support function. The court, however, found that the legislative history of the APA contradicts a broad interpretation of the scope of the military affairs exception:

> [I]f the Secretary's position were adopted, and contractor support activities held to be within the scope of the military function exception, maintenance staff, custodial help, food service workers and even window washers could find their undoubtedly necessary support tasks swept within the exceptions's ambit, and DOE regulations affecting their employment exempt from notice and comment. Neither the statute, nor common sense, requires such a result. . . . The record in this case . . . does not contain any evidence that the military has ever exercised any direct supervisorial control over the activities of these civilian contract guards.[25]

In the same way, the *24 GHz Order* seeks to include the reallocation of incumbent DEMS operations to the 24 GHz band within the military function exception. As in *O'Leary*, this conclusion fails, and a notice of proposed rulemaking is required. The military has no direct control, supervisorial or otherwise, over the operations on the 24 GHz band. The Commission's reasoning for invoking the military affairs exception — that "[t]he rules adopted in this order . . . involve the exercise of military functions of the United States in that they ensure the government's current and

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[24] *Id.* at 767.

[25] *Id.* at 770.

future ability to operate military space systems in the 18 GHz frequency band"[26] — is wrong and does not provide the requisite nexus to military affairs.[27]

To the contrary, the migration of DEMS to the 24 GHz band is clearly a *non-military* consequence of the 18 GHz reallocation. It is the 18 GHz band that has been reallocated for Government downlink fixed-satellite transmission, and it is the 18 GHz band that employs military space systems. For nearly two years, since July 1995, military-linked fixed-service coordination procedures operating on the 18 GHz band have effectively protected military functions from the possibility of interference from DEMS service providers in the highly populated military operations regions of Maryland, Virginia, the District of Columbia and Denver, Colorado.[28] In short, it is only the 18 GHz band — *and not the 24 GHz band* — that has a nexus to military affairs and national security.

There is no military affairs justification for exempting the 24 GHz rules from public notice and comment. The military affairs exemption must continue to be narrowly confined, as the Commission and the courts have previously recognized, in order to prevent the exemption from swallowing the rule.

B. Good Cause Does Not Exist For Adopting a DEMS Reallocation Without Notice And Comment

The Commission also relied on 5 U.S.C. § 553(b)(B) to avoid notice and comment rulemaking. Under this provision of the APA, rules may be adopted without notice and comment

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[26] *24 GHz Order* at ¶ 18.

[27] *O'Leary*, 57 F.3d at 770.

[28] For Maryland, Virginia, the District of Columbia and Denver, fixed service licensees were not permitted to begin operating until their applications are approved, whereas in all other parts of the U.S. licensees may begin conditional operations upon filing an application for a license to operate. 47 C.F.R. § 101.5(d).

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary* or *contrary to the public interest.*[29]

The proceeding at hand simply does not satisfy this requirement.

The case law and legislative history make clear that this is a strict standard, setting forth only "narrow" exceptions.[30] Congress did not intend the "good cause" exemption to become an "escape clause," and it therefore spelled out the limited situations where notice and comment could be dispensed with for good cause:

> A true and supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking a public rulemaking proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest' supplements the term "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.[31]

The Commission's action does not fall within any of the categories of the good cause exception. First, no true and supportable finding of necessity or emergency was made and published, nor could there be such a finding. The Commission intends, by the rules contained in its *24 GHz Order,* to lift the 1996 *Freeze Order* and grant certain ripe, non-mutually exclusive pending DEMS and nodal applications. Once those applications are granted, those licensees will be

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[29] 5 U.S.C. § 553(b)(3)(B) (emphasis added).

[30] *National Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384, 385 (2d Cir. 1978) (*citing Legislative History of the Administrative Procedure Act 1944-1946*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946)); *see Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995).

[31] *Legislative History of the Administrative Procedure Act 1944-1946*, S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

permitted to operate on the 18 GHz band until the year 2001.[32] The Commission's generous grant of a nearly four-year transition period for incumbent 18 GHz licensees to migrate to the 24 GHz band demonstrates that there is no emergency and that there is more than adequate time to accommodate APA notice and comment requirements. The Commission could have issued a notice of proposed rulemaking in March, with an expedited comment date, followed swiftly by a report and order. The short delay involved would not have had any effect on the migration, given the lengthy transition period. Accordingly, the Commission cannot base its action on the existence of an emergency warranting its dispensation of notice and comment.

Likewise, the exception for impracticability is plainly unavailable. The "due and required execution of the functions" of the Commission can hardly be "unavoidably prevented" by a rulemaking procedure that was open for public comment, especially in light of the fact that the 18 GHz band has been protected from interference for nearly two years due to special coordination procedures that were put in place in July of 1995, and the nearly four-year transition period that the Commission has permitted for the relocation of incumbent licensees from the 18 GHz band to the 24 GHz band.[33] Again, it would have been entirely practicable for the Commission to have conducted a narrow rulemaking in a timely fashion, before adopting the rule changes.

Moreover, it cannot be said that the *24 GHz Order* involves a "minor or merely technical amendment in which the public is not particularly interested."[34] The Commission's decisions concerning the 24 GHz band are highly substantive rule changes concerning spectrum allocation and the assignment of additional spectrum to incumbent licensees. The *Order* designates the use to

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32 *24 GHz Order* at ¶ 14.

33 S. Doc. No. 248, 79th Cong., 2d Sess. (1946), entitled "Legislative History of the Administrative Procedure Act 1944-1946."

34 *Id.*

which the entire 24 GHz band will be constrained, and succinctly states who will be given that spectrum. Even a cursory glance at the comments in any spectrum allocation proceeding makes clear that the allocation of the valuable rights associated with spectrum usage is a highly charged issue of great interest to the public.

Finally, the Commission cannot invoke the "public interest" exception because a public rulemaking would not have had such an impact on Commission operations as to "prevent . . . [the Commission] from operating."[35] The Commission waited from August 1996, when it placed a freeze on 18 GHz DEMS applications, to March 1997 to issue the order; a few more months would not have affected Commission operations — even those associated with DEMS. Moreover, the burden involved in conducting a narrowly confined rulemaking would not have had a significant effect on the Commission's overall workload, preventing it from performing its basic functions. In response to the Telecommunications Act, the Commission demonstrated its ability to conduct many highly complex rulemakings simultaneously, while at the same time continuing with its licensing functions and conducting auctions. One more rulemaking would not have brought the Commission to a standstill.

Accordingly, the *24 GHz Order* soundly fails to qualify for the good cause exception to the notice and comment requirements of the APA. The Commission's simple statement that good cause exists to forego involving the public in proceedings concerning the disposition of valuable national spectrum resources, without more, is not enough — and the courts agree. As the Second Circuit noted, "[a] mere recitation that good cause exists" is insufficient to invoke the good cause

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35 *Id.*

exception.[36] BellSouth requests, therefore, that the Commission set aside its decision and issue a notice of proposed rulemaking.

C. The Military Affairs Exemption Does Not Shield from Notice and Comment Rulemaking a Spectrum Allocation Designed to Address a Dispute over Private, Non-Governmental Usage of Spectrum

The direct and immediate effect of the Commission's *24 GHz Order* was to accommodate the private, nongovernmental spectrum needs of Teledesic and Associated, not those of the government. The Commission cannot use the government affairs exception as a means to exempt its resolution of a private dispute from the APA's requirement of notice and comment rulemaking.

Indeed, the Commission's swift and unilateral decision to clear DEMS licensees from the 18 GHz band, along with its simultaneous release of an *Order and Authorization,* which permitted Teledesic to construct, launch, and operate, unencumbered, an international satellite system on the 18 GHz band, appears to have been driven more by the desire to aid Teledesic and Associated than to address Defense Department spectrum needs.[37] In its *Order and Authorization*, the Commission explains that "[b]ecause Teledesic and DEMS will not share spectrum, there is no requirement for the licensees to coordinate their operations."[38]

As discussed above, there was no urgency with respect to the military need for clearance of 18 GHz spectrum, and there was no military need for re-allocation of 24 GHz spectrum. However, there was a serious dispute as to whether Teledesic and Associated could (or were willing to) share

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36 *Xin-Chang Zhang v. Slattery,* 55 F.3d 732, 746 (2d Cir. 1995).

37 *See, e.g., 24 GHz Order* at ¶¶ 9-10, 16-17.

38 *Id.* at 3161.

the 18 GHz band.[39] Teledesic's position was that it could not share the 18 GHz spectrum with Associated "due to interference with its Earth station downlinks in the 18 GHz band,"[40] while Associated said that "the 18 GHz band can be shared by DEMS and satellite services."[41]

The discussions between Teledesic and Associated concerning their joint use of the 18 GHz band for similar service offerings were widely reported to be acrimonious.[42] The dispute began only days after Associated hired its new Chairman and CEO, and a month after the Commission released the *LMDS R&O*. In response to the latter decision, Associated immediately filed numerous 18 GHz DEMS license applications,[43] whereupon Teledesic requested a filing freeze.[44] When the Commission, in response, ordered a filing freeze on certain 18 GHz applications, it said nothing about military affairs, although it acknowledged Associated's and Teledesic's filings.[45]

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[39] *Microwave Telecom Backers Begin Battle for 18 GHz*, Mobile Satellite News, Sept. 5, 1996, Vol. 8, No. 18 (*Battle for 18 GHz*).

[40] *28 GHz Order* at ¶ 10.

[41] Jeffrey Silva, *Teledesic Files with FCC to Prevent Additional 18 GHz Licensing*, Radio Comm. Report, Sep. 9, 1996 at 3. Teledesic official Scott Blake Harris (the former Chief of the Commission's International Bureau) explained that "'[i]n large measure [the DEMS allocation] was forgotten.' While senior FCC officials were supporting the international negotiations which lead to the 18 GHz [fixed satellite service] allocation, lower-level FCC staffers were accepting new — and incompatible — DEMS applications." An attorney for Associated, however, took the position that the FCC has "known about us . . . since 1993, when our applications were put on public notice. . . . What we think happened is Teledesic told the FCC they could coordinate." *Battle for 18 GHz.*

[42] Kevin Maney, *Wireless Rivals Square Off in High-Frequency Fight*, USA Today, Sep. 26, 1996, at 2B ("dogfight"); Thomas W. Haines, *Stakes High in Wrangling over Wireless Rights*, Seattle Times, Oct. 20, 1996, at 1 ("wrangling"); Mike Mills, *Firms Ask FCC to Help Settle Airwaves Dispute*, The Washington Post, Mar. 12, 1997, at C10 ("turf war").

[43] *Freeze Order* at ¶ 2.

[44] *Id.* at ¶ 3.

[45] *Id.* at ¶¶ 2-3.

Similarly, on March 19, 1997, when Associated and Teledesic jointly filed a DEMS reallocation agreement with the Commission, the letter contained nothing about military affairs concerns.[46] The Commission's *24 GHz Order* specifically acknowledged this letter[47] and adopted several of its key features: (1) the reallocation of DEMS from the 18 GHz band to the 24 GHz band, (2) a reallocation target date of Jan. 1, 2001, and (3) continued buildout of existing DEMS systems in the 18 GHz band until Jan. 1, 2001.[48] While the Commission *said* it was acting in order to accommodate military needs, its statement that the relocation of DEMS licensees as set forth in the *24 GHz Order* was "consensual [in] nature"[49] demonstrates that its decision was more fundamentally intended to achieve the non-military objective of resolving the Associated-Teledesic dispute, which the Commission had hoped to settle for months.[50]

Given that a major acknowledged reason for the reallocation was to facilitate settlement of a private dispute over spectrum usage, and that the 24 GHz spectrum will be used for private, not military purposes, the Commission may not lawfully cloak its reallocation proceeding in the military

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[46] Letter dated February 27, 1997, from Russell Daggatt, President, Teledesic Corporation, and Laurence Harris, Counsel for Associated, to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, and Donald H. Gips, Chief, International Bureau.

[47] *24 GHz Order* at ¶ 10 & n.14.

[48] *Id.* at ¶¶ 14, 17.

[49] *Id.* at ¶ 14 n.20.

[50] According to one report, the FCC "act[ed] as mediator in the dispute, trying to find a peaceful solution that enables both newcomers to bring new competition services to the telecommunications marketplace settlement between Teledesic and Associated." Jeffrey Silva, *Relocation Settlement for Associated Coming*, Radio Comm. Report, Jan. 27, 1997, at 12; *see* Mike Mills, *Firms Ask FCC to Help Settle Airwaves Dispute*, The Washington Post, Mar. 12, 1997, at C10; June Shiver Jr. and Michael A. Hiltzik, *Airwaves Giveaway Gets Static*, The Washington Post, March 13, 1997, at A1.

affairs exemption. Any rule changes needed to allocate 24 GHz spectrum for private use must be adopted through notice and comment rulemaking.

II. THE REALLOCATION DOES NOT SERVE THE PUBLIC INTEREST

A. The Commission's Allocation of Spectrum in the 24 GHz Band Will Result in a Windfall to Incumbent DEMS Licensees

In its *24 GHz Order*, the Commission assigned four times the amount of 24 GHz spectrum to incumbent DEMS licensees than they previously occupied on the 18 GHz band. This is a wholly unjustified windfall for those licensees — a quadrupling of their valuable spectrum resources without cost and without having to compete for the spectrum at an auction.

The Commission based its decision to assign these licensees this generous amount of spectrum without public comment, in reliance on its own study, which members of the public had no opportunity to challenge before the decision was made. The Commission's DEMS Relocation and Technical Description ("technical description") finds that "systems at 24 GHz will require approximately four times the bandwidth as at 18 GHz to maintain equivalent capacity and coverage."[51] However, the Commission's analysis is questionable.

For example, the technical description assumes that the DEMS industry will be utilizing the same equipment in 2001 as it is using today, *i.e.*, equipment with the same information and system capacity and the same antennas. However, the transition period that the Commission has given DEMS licensees to relocate from the 18 GHz band to the 24 GHz band is four years — a very long time, especially where spectral technological advances are concerned. Public comment on this would indicate whether there is a reasonable opportunity for the development of more efficient DEMS equipment between now and the relocation deadline in 2001.

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[51] *24 GHz Order*, Appendix B. See Attachment A.

Had the public been given the opportunity to challenge the Commission's technical description results, or to provide alternative solutions, perhaps the result would have been different. There is, however, one thing for certain — the Commission's decision to give incumbent 18 GHz licensees additional spectrum is not based on a complete or adequate record. Absent the development of a full record in a proceeding open to public participation, the Commission cannot lawfully provide DEMS incumbents with four times the amount of spectrum in the 24 GHz band than they occupied in the 18 GHz band. That this is a windfall for these licensees is clear. Moreover, with each incremental increase in efficiency that is developed, the value of the windfall conferred by the Commission on the incumbents grows larger.

Not only should incumbent DEMS licensees receive the same amount of spectrum on the 24 GHz band that they occupied on the 18 GHz band, but those incumbent licensees should also receive the same assistance from those who will replace them that the former occupants of the 1.85 - 2.20 GHz band ("2 GHz band") received from their replacements.[52] Commission precedent requires this result.[53] This assistance should include the following. First, those who will replace the DEMS on the 18 GHz band should be required to guarantee payment of all relocation costs, including all engineering, equipment, site and Commission fees, along with any reasonable additional costs that the relocated DEMS licensees may incur as a result of operating on the 24 GHz band. Second, those replacing DEMS on the 18 GHz band should be required to complete all activities necessary for implementing new facilities for those transitioned to the 24 GHz band, including engineering, frequency coordination and cost analysis of the complete relocation procedure. Those activities

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[52] *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 F.C.C.R. 6886, 6890 (1992).

[53] *Id.*

should also include identifying and obtaining, on the incumbents' behalf, new frequencies or other facilities where applicable. Third, those replacing DEMS on the 18 GHz band should be required to build the new DEMS system and test it for comparability to the existing DEMS system. Fourth, the DEMS licensees should not be required to relocate from the 18 GHz band to the 24 GHz band until comparable alternative facilities are available for a reasonable period of time, in order to ensure the opportunity for adjustments and a "seamless handoff."[54] Fifth, if within one year after the new 24 GHz DEMS facilities are in operation, those facilities are demonstrated by the DEMS licensees to be incomparable to the former facilities, then those replacing DEMS on the 18 GHz band should be required to remedy any deficiencies.

B. The Public Interest Would be Best Served by Reallocating DEMS Licensees the Same Amount of Spectrum in the 24 GHz Band as They Occupied in the 18 GHz Band

By authorizing substantial additional spectrum for DEMS, the Commission has gone well beyond what was necessary to make the DEMS incumbents whole. Even when the federal government exercises its power of eminent domain — which is not involved here — the government is not required to give the party whose property is taken or whose use and enjoyment of such property is interfered with *more* than just compensation.[55] Here, even though the Commission may not even be required to provide the incumbent licensees with replacement spectrum, it has instead *quadrupled* their spectrum rights.

The Commission has spoken to this issue in *Revision of Rules and Policies for the Direct Broadcast Satellite Service,* by finding that a "transfer of . . . channels to operators that have already

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54 *Id.*

55 *Backus v. Fort Street Union Depot Co.*, 169 US 557, 573, 575 (1898).

developed service using their current channels would be a windfall to those operators."[56] In that same proceeding, the Commission ultimately decided to employ competitive bidding for the additional spectrum. The Commission found that "[a]uctioning the spectrum would ensure that the ultimate holder of those channels paid their market value to the U.S. Treasury and was not unjustly enriched."[57] The Commission should reach the same result here. In the *24 GHz Order*, the Commission bestows a substantial amount of additional spectrum on incumbent 18 GHz licensees who have already developed service using their current channels. This windfall will result in unjust enrichment of the DEMS licensees, and untold financial loss to the U.S. Treasury. In order to avoid such an outcome, the Commission should allocate the same amount of spectrum in the 24 GHz band that DEMS was apportioned at 18 GHz, and conduct a competitive bidding procedure concerning the additional spectrum on the 24 GHz band.

Congress has required the Commission to prescribe rules to prevent the unjust enrichment of recipients of licenses.[58] In accessing whether competitive bidding will promote the public interest objectives set forth in Section 309(j)(3) of the Communications Act, the Commission looks at whether the following objectives will be served:

> (A) development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants,

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56 *See Revision of Rules and Policies for the Direct Broadcast Satellite Service,* IB Docket No. 95-168, PP docket No. 93-253, *Report and Order,* 11 F.C.C.R. 9712, 9779 (1995) (*"DBS R&O"*).

57 *Id.*

58 The Communications Act, as amended, 47 U.S.C. § 309(i)(4)(C)).

> including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
>
> (D) efficient intensive use of the electromagnetic spectrum.[59]

The Commission's employment of competitive bidding procedures in the 24 GHz band will further each of those four objectives. Paying for spectrum provides incentives for the licensee to construct its operation quickly in order to obtain a return on its investment. The Commission has found that such payment comports with the "development and rapid deployment" prong of the objectives.[60]

Moreover, speed in and of itself is not a prominent concern in this case. As noted above, the Commission has provided a transition period of almost four years for incumbent DEMS service providers to move from the 18 GHz band to the 24 GHz band. Even one year would be more than enough time in which to effectuate an orderly, efficient auction of the extra spectrum on the 24 GHz band. Competitive bidding is also a better solution to the Commission's concern about an "excessive concentration of licenses," than giving the additional spectrum to a class of operators that includes only incumbent DEMS licensees.

By submitting the extra spectrum in the 24 GHz band to a competitive bidding procedure, the Commission will also ensure that the public will recover a portion of the value of the spectrum and that there will be no unjust enrichment. The Commission's current plan does neither.

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[59] Communications Act of 1934, as amended, 47 U.S.C. § 309(j)(3)(A).

[60] *See Establishment of Rules and Policies for the Digital Audio Radio Service,* IB Docket No. 95-91; GEN Docket No. 90-357, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking,* FCC No. 97-70 (rel. Mar. 3, 1997), *summarized* 62 Fed. Reg. 11083 (Mar 11, 1997) (*"DARS R&O/MO&O/FNPRM"*).

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to vacate its *24 GHz Order* and issue a notice of proposed rulemaking.

Respectfully submitted,

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ATTACHMENT A